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Supreme Court of the United States

JAMES LARUE, PETITIONER,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC. EMPLOYEES' SAVINGS PLAN, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF *AMICI* CURIAE

Amici curiae respectfully submit this brief in support of the petitioner, James LaRue, urging the reversal of the judgment of the United States Court of Appeals for the Fourth Circuit, because that judgment is inconsistent with the language and intent of the ERISA statute and with this Court's precedent.[1]

Amici are law professors at eleven law schools throughout the United States who teach and write about various subjects (*e.g.*, ERISA remedies,[2] duties of ERISA fiduciaries,[3] class action litigation,[4] financial market regulation[5]) that relate to the questions presented by this case: (1) whether 29 U.S.C. §§ 1132(a)(2) and 1109, sections 502(a)(2) and 409 of ERISA respectively, permit a participant of a "defined contribution plan" to bring an action for losses attributable to his account caused by a fiduciary breach and (2) whether 29 U.S.C. §§ 1132(a)(3), section

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[1] This brief is submitted pursuant to the consent of the parties to the filing of *amicus curiae* briefs. Petitioner's general consent for the filing of *amicus curiae* briefs was filed with the Court on July 27, 2007. Respondents' consent, dated July 30, 2007, is included herein. Pursuant to this Court's Rule 37.6, *amici curiae* represent that this brief was not authored, in whole or in part, by counsel for any party and that no party other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The names of the educational institutions are provided for identification purposes only.

[2] *See, e.g.*, Roger Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595 (2004).

[3] *See, e.g.*, Paul Secunda, *Inherent Attorney Conflicts of Interest Under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. Marshall L. Rev. 721 (2006).

[4] *See, e.g.*, John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. Ill. L. Rev. 903 (2005).

[5] *See, e.g.*, Frank Partnoy, *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets*.

502(a)(3) of ERISA, permits a participant of a "defined contribution plan" to bring an equitable surcharge action for monetary "make-whole" relief to compensate for losses caused by a breaching fiduciary.[6] Moreover, as professors who teach and write about civil procedure[7] and federal jurisdiction,[8] *amici* also have an interest in the issues raised by Respondents' motion to dismiss the writ.

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[6] Because LaRue is clearly entitled to proceed under section 502(a)(2) of ERISA, it is unnecessary for this Court to decide the section 502(a)(3) question. Should the Court reach the 502(a)(3) question, *amici* agree with Petitioner that the historically equitable remedy of surcharge can provide "make-whole" relief against breaching trust fiduciaries. Surcharge is intended to serve as a sanction against a fiduciary for the mismanagement of an account. *See Restatement (Second) of Trusts* § 199 (1959) (explaining that such remedy is intended to "compel the trustee to redress a breach"); Story, 1 *Eq. Jur.* § 525 ("A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be allowed."). The appropriate amount of surcharge relief can be measured by "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." *See Restatement (Third) of Trusts* § 205, cmt. a (1992). The remedy, deeply rooted in the tradition of the English Court of Chancery, was typically available at the time of the divided bench. *See Duvall v. Craig*, 15 U.S. (2 Wheat.) 45, 56 (1917) ("A trustee, merely as such, is, in general, only suitable in equity."). Accordingly, the Court's requirements for seeking appropriate equitable relief under Section 502(a)(3), set forth in *Mertens v. Hewitt Assocs.*, 508 U.S. 28 (1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); and *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S. Ct. 1869 (2006), are satisfied.

[7] *See, e.g.*, John Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522 (2007).

[8] *See, e.g.*, Radha A. Pathak, *Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction*, 85 Or. L. Rev. 59 (2006).

SUMMARY OF ARGUMENT

Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 to protect employees in employer-based pension and welfare plans. It passed the legislation "[a]fter several highly visible pension plan failures and abuses in the 1960s and early 1970s." United States General Accounting Office, Report to Congressional Requesters, Employer-Based Managed Care Plans, ERISA's Effect on Remedies for Benefit Denials and Medical Malpractice 4 (1998), available at http://www.gao.gov/archive/1998/he98154.pdf (last visited on July 25, 2007). Congress recognized that "frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them." Remarks of Sen. Ribicoff, *reprinted in* 3 Leg. Hist. 4811; 120 Cong. Rec. 29957 (1974). As such, Congress deemed it necessary to create a broad federal system of requirements and safeguards designed to protect employees. *See* Ellen A. Fredel, *ERISA and Managed Care: What the Courts are Saying*, 8 Benefits L.J. 105 (1995). In particular, Congress sought to "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds." Remarks of Sen. Bentsen, *reprinted in* 3 Leg. Hist. 4795; 120 Cong. Rec. 29954 (1974); *see also* Remarks of Rep. Biaggi, *reprinted in* 3 Leg. Hist. 4661; 120 Cong. Rec. 29196-29197 (1974) ("This bill will establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds"); Remarks of Rep. Dent, *reprinted in* 3 Leg. Hist. 4668; 120 Cong. Rec. 29206 (1974) ("These standards ... will prevent abuses ... by those dealing with plans."). Consistent with such legislative history, this Court has recognized that "[s]pecial congressional concern" has focused on preserving the integrity of plan asset management. *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

ERISA regulates "employee benefit plan[s]," which are defined as "employee welfare benefit plan[s]," "employee pension benefit plan[s]," or plans that are both welfare and pension benefit plans. 29 U.S.C. § 1002(3) (defining "employee benefit plan"), § 1003 (describing coverage of Chapter 18, subchapter I). Employee welfare benefit plans include, *inter alia*, employee health insurance and disability plans. 29 U.S.C. § 1002(1). An employee pension benefit plan is a retirement plan, and it can be structured as either a defined benefit plan or a defined contribution plan. 29 U.S.C. § 1002(34) ("defined contribution plan"); §1002(35) ("defined benefit plan"). A defined benefit plan is a plan that promises certain, specified benefits to employees when they retire. The typical defined benefit plan promises a certain amount of money – often some percentage of the employee's salary – to the retiree per month for the rest of his or her life. A defined contribution plan, by contrast, does not promise a certain sum of money to the retiree. Rather, the employee (and perhaps also the employer) make contributions over time to the employee's individual account within the plan, the plan fiduciaries invest those contributions in the hope that they will grow at a favorable rate, and, upon retirement, the employee withdraws funds from his or her individual account.

As "the crucible of congressional concern was a misuse and mismanagement of plan assets by plan administrators," *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985), Congress has imposed significant duties on the persons responsible for retirement plans – the fiduciaries in charge of plan management. *See* 29 U.S.C. § 1104(a). The duties imposed on ERISA fiduciaries are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).[9] Breach of those duties, there-

[9] *Donovan v. Bierwirth* has been cited by numerous other federal courts of appeals, including *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir.

fore, cannot be taken lightly: ERISA's enforcement scheme contemplates the availability of civil remedies against fiduciaries who fail to comply with their responsibilities. At issue in this case are two of ERISA's civil enforcement provisions: sections 502(a)(2) and 502(a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3) respectively. In this brief, *amici* will address the disputed issues surrounding 502(a)(2).

By denying LaRue the opportunity to proceed under section 502(a)(2), the Fourth Circuit's holding undermines the availability of ERISA's important and well integrated remedial provisions. The Fourth Circuit's holding that LaRue failed to allege a loss to the plan within the meaning of section 502(a)(2) proceeds from a fundamental misunderstanding of the composition and functioning of a defined contribution plan. Where a fiduciary's breach of duty causes a diminution in the total assets of the plan, it can be seen as nothing other than a loss to the plan within the meaning of section 502(a)(2). The total assets of a defined contribution plan are nothing more than the aggregation of the value of each individual account within the plan. As such, it is entirely irrelevant that the diminution in value occurred within the boundaries of one individual participant's account; appropriate remediation for the loss to the account, and hence to the plan, is available under section 502(a)(2).

Furthermore, LaRue's withdrawal of funds from his account with the DeWolff, Boberg & Associates, Inc. Employees' Savings Plan (the "DeWolff Plan") does not necessitate dismissal of the writ as moot. LaRue's claim accrued at the time the plan fiduciaries failed to perform their duties. His individual account balance – and therefore the total assets of

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2007); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 444 (6th Cir. 2002); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000); *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1361 (11th Cir. 1997); and *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).

the plan – would have been greater had such breaches not occurred. The DeWolff Plan will benefit from any recovery that LaRue's lawsuit may produce. In turn, LaRue individually will be entitled to an appropriate plan apportionment of that recovery, even though he has withdrawn his funds from his account. As such, there remains a live controversy for this Court to resolve.

ARGUMENT

I. RELIEF UNDER ERISA § 502(A)(2) IS AVAILABLE WHERE, AS HERE, THE DIMINUTION IN VALUE OF AN INDIVIDUAL ACCOUNT REFLECTS A DIMINUTION IN VALUE OF THE TOTAL ASSETS OF THE PLAN.

ERISA section 502(a)(2) provides that "[a] civil action may be brought...by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section [409]." 29 U.S.C. § 1132(a)(2). ERISA section 409(a) provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach..." 29 U.S.C. § 1109(a).

The Fourth Circuit erred in holding that section 502(a)(2) relief is unavailable to LaRue. In his complaint, LaRue alleged that the DeWolff Plan fiduciaries failed to follow his investment instructions and that "his interest in the Plan [was] depleted approximately $150,000 as a result. Br. in Opp'n., App. 3a (Complaint, ¶ XIV). Contrary to the Fourth Circuit's holding, such a loss to LaRue's individual account necessarily entailed a loss to the DeWolff Plan as a whole. A defined contribution plan is nothing more than the sum of its individual accounts. As a result, a defined contribution plan may well be affected by losses that occur within the boundaries of any one individual account. Such a loss is

no less significant than the losses that are visited upon a group – or all – of the individual accounts in the plan. The Fourth Circuit's holding to the contrary is inconsistent with ERISA's regulatory scheme and the well–established precepts of trust law upon which ERISA is founded.

A. Fiduciaries' Conduct Toward An Individual Account Holder Constitutes Conduct Toward The Plan As A Whole.

The Fourth Circuit construed LaRue's theory of recovery as individualized, rather than sufficiently focused on the plan as a whole. Pet. for Writ of Cert., App. 6a. In rejecting LaRue's section 502(a)(2) claim as one for individual relief, the Fourth Circuit created a false dichotomy between the plan on one hand and LaRue as an individual account holder on the other. One of the essential characteristics of a defined contribution plan is the fact that it is comprised of individual accounts. ERISA's definition makes this point clear:

> The term "individual account plan" or "defined contribution plan" means a pension plan *which provides for an individual account for each participant* and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1002(34) (emphasis added). The statute itself defines the plan by reference to its individual components.

Contrary to the Fourth Circuit's understanding, a breach of a fiduciary duty owed to an individual account holder may well constitute a breach of duty owed to the plan itself. As such, it is not helpful to distinguish between a breach of fiduciary duty towards one participant (and the loss that attends such a breach) and the breach of duty towards many of the participants within the plan.

The plain language of ERISA reflects Congress's position that actions taken with respect to a participant or his or her individual account may be with respect to the plan as a whole. For example, ERISA states that "a person is a fiduciary *with respect to a plan* to the extent ... he renders investment advice for a fee. . . ." 29 U.S.C. § 1002(21) (emphasis added). The United States Department of Labor (the "Department") has interpreted this provision to include a person who provides investment advice for a fee to a single participant. *Cf.* 29 C.F.R. § 2509.96-1 (clarifying the circumstances under which a person who renders investment advice for a fee to any participant will be considered a fiduciary of the plan). Thus, a person's conduct towards one participant may render the person a fiduciary towards the plan as a whole.

Similarly, ERISA's prohibited transaction rules indicate that even a transaction involving only one participant's account may be a transaction of the plan as a whole. ERISA section 406(a) prohibits fiduciaries from "caus[ing] the plan to engage in a transaction" that constitutes the direct or indirect lending of plan assets, unless an exemption applies. 29 U.S.C. § 1106(a)(1)(B). The Department has issued regulations stating that the failure by a plan sponsor – usually the employer who set up the retirement plan – to contribute 401(k) salary deferrals to a retirement plan results in a prohibited loan from the plan to the plan sponsor. *See* 29 C.F.R. § 2510.3-102 (stating that "the assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution to the plan."). In other words, if a plan sponsor fails to timely transfer the funds that an employee has directed to be withheld from his paycheck for retirement, the plan sponsor can be considered to have caused "the plan" to have engaged in a prohibited loan. This is the case even if the plan sponsor

fails to timely convey only one employee's salary withholdings to the plan. That is, "the plan" will have engaged in a prohibited transaction (a prohibited loan to the plan sponsor) even if the plan sponsor retained the deferred salary for only one individual account.

B. The Manner By Which A Defined Contribution Plan Functions Makes Clear That The Plan May Be Harmed By Losses To Individual Accounts.

ERISA's remedial scheme must be interpreted in light of the structure of a defined contribution plan as a collection of individual accounts. This Court need only analyze that structure, as well as how defined contribution plans function as a practical matter, to understand that a loss to an individual account within a defined contribution plan can constitute a loss to the plan as a whole and can thus be properly redressed under section 502(a)(2).

1. A defined contribution plan's assets are nothing more than the assets in each of the plan's individual accounts.

A defined contribution plan's assets consist of all of the assets within each individual account in the plan. Dan M. McGill *et al.*, Fundamentals of Private Pension 247 (7th ed. 1996) ("[T]he sum of all the account balances . . . equals the total market value of the plan's assets.").[10] That is, in a defined contribution plan, the assets in each participant's individual account plan collectively comprise the corpus of a

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[10] Further, lower courts have recognized that even employee contributions that are withheld by the employer and not received by the plan still qualify as plan assets that may be recovered as a loss to the plan under section 502(a)(2). *See, e.g., U.S. v. Grizzle*, 933 F.2d 943, 947 (11th Cir. 1991); *Livers v. Ming Y Wu*, 6 F. Supp. 2d 921, 928 (N.D. Ill. 1998); *Prof'l Helicopter Pilots Ass'n v. Denison*, 804 F. Supp. 1447, 1453 (M.D. Ala. 1992); PBGC v. Solmsen, 671 F. Supp. 938, 945-46 (E.D.N.Y. 1987).

trust. The assets in each participant's individual account consist of all individual account contributions (*e.g.*, amounts that the employee chooses to have withheld from his or her salary and the "matching" or profit sharing amounts provided by employers) as well as earnings (*e.g.*, money earned by investment of the contributions).

The assets of a defined contribution plan are held in a unitary fashion and legally owned by one or more trustees. *See* 29 U.S.C. § 1103(a); 26 U.S.C. § 401(a). Participants do not own their individual accounts. Indeed, a bedrock principle of trust law is that title to trust assets are held by trustees for the benefit of trust beneficiaries. *See* Charles E. Rounds, *Loring: A Trustee's Handbook* 1 (2001) ("[T]itle [held by a trustee] and asset aggregation are the keys to unlocking the secret of the trust."). The Department's regulations make clear that participant contributions become plan assets subject to ERISA, "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets," 29 C.F.R. § 2510.3-102(a), (b), and no later. In other words, the portion of an individual's salary that is withheld for investment in a retirement plan becomes a "plan asset" very quickly.

Since participants and beneficiaries will ultimately rely on the funds in a particular individual account, the significance of such accounts' existence cannot be denied. In many important respects, however, the individual accounts turn out to be symbolic. As contributions and earnings cause the plan assets to grow, they are allocated to individual participants' accounts. David A. Littell *et. al.*, *Retirement Savings Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement* 6 (1993) ("[A]s amounts are contributed to the trust, they are allocated to the participant's account."). But the allocation does not represent any formal transfer of ownership to the participant. "[A] qualified trust may . . . not allow the participant to have the right to ac-

quire, hold, and dispose of amounts attributable to the participant's account balance at will." Rev. Rul. 89-52, 1989-1 C.B. 110. The assets remain in the control of the plan fiduciaries for the benefit of the plan (and participants and beneficiaries). Thus, while it is certainly true that the defined contribution plan is comprised of individual accounts, it is critical to understand that the individual accounts exist as a "bookkeeping matter," Br. for the U.S. as *Amicus Curiae* 5, to reflect the allocation of interests in the plan.

2. The plan's assets, situated in individual accounts, must be available for the plan's maintenance and functioning.

The total assets held by the plan are utilized to pay plan benefits and defray the cost of operating the plan. *See* 29 U.S.C. § 1104(a) (requiring fiduciaries to act for the exclusive purpose of providing benefits and paying expenses); 26 U.S.C. § 401(a). For defined contribution plans, these expenses are necessarily paid by the individual accounts that comprise the plan.[11] Costs of operating the plan – typically including items such as investment expenses, recordkeeping fees, and distribution fees – are usually charged to each individual account, on either a pro rata or per capita basis. *See generally* Field Assistance Bulletin No. 2003-3, 2003 WL 24127777 (May 19, 2003) (outlining proper methods of plan

[11] It is theoretically possible for a plan sponsor to pay for all of the plan's expenses. However, in practice at least *some* plan expenses are paid by the individual accounts in every defined contribution plan. Of course, the fact that individual accounts are always at least partly responsible for plan expenses is not the only reason why the plan is more than a legal fiction. Even a defined contribution plan that shifted *no* expenses to the individual accounts would be properly conceived of as a trust, in which the corpus of the trust was comprised of the assets in each individual account. The fact that a trust's assets are held in multiple accounts does not change the nature of the trust itself.

expense allocation). Regardless of the specific method of allocation, each individual account typically supports and maintains the plan of which it is a part.

3. Any recovery under section 502(a)(2) will be a plan asset.

If LaRue prevails upon his 502(a)(2) claim, he will not be immediately entitled to the funds recovered by virtue of winning his claim against the fiduciaries. Instead, any monies awarded will first be restored to the plan. This is clear from the Department's treatment of funds that are similar to the money that LaRue may recover in his lawsuit.

If the fiduciaries are ultimately held to be liable for breach of their duties, then any amounts paid by them that are attributable to the investments elected by LaRue would constitute plan assets. The Department has indicated in several contexts that amounts received as a result of a plan's investments are plan assets. In Field Assistance Bulletin 2006-1, the Department addressed itself to settlement funds that were generated as a result of enforcement activity by the Securities and Exchange Commission ("S.E.C.") against a number of mutual funds. *See generally* Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006). Via "independent distribution consultants (IDCs)," the S.E.C. had arranged for distribution of the settlement funds to investors, including direct payments to retirement plans who were the shareholders of record or to intermediaries who provided services to retirement plans, including broker-dealers, underwriters and recordkeepers, where omnibus accounts were used to aggregate the holdings of multiple plans. The settlement restored losses to mutual fund investors that resulted from late trading and market timing. *Id.* at 1. The Department explained that, as soon as the plan or intermediary (where an omnibus account was used) received the settlement proceeds, those proceeds would be consid-

ered plan assets. *Id.* at 3. This would be true even for plans that were terminated by the time the intermediary received the settlement money. *Id.* at 5.[12]

Similarly, in Advisory Opinion 2005-08A, the Department stated that litigation proceeds paid to policyholders of Blue Cross and Blue Shield of Minnesota were plan assets to the extent that the plan was the investor. The plan was considered the investor where plan assets were used to purchase policies. The Department explained:

> Generally, a distribution such as the Payment, will be a plan asset if a plan has a beneficial interest in the distribution under ordinary notions of property rights. . . . *In the case where* any type of plan or trust is the policyholder, or where *the premium is paid entirely out of trust assets, it is the view of the Department that the entire distribution amount received by such policyholder constitutes plan assets.*

Advisory Opinion No. 2005-08A, 2005 WL 1208695 (May 11, 2005) at 3 (emphasis added).

Further, the Department also stated that amounts received by policyholders in the demutualization of an insurance company were plan assets to the extent they were at-

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[12] The Field Assistance Bulletin stated:

> An intermediary may also receive [settlement] proceeds on behalf of plans that have terminated. *In such instances, an intermediary should make reasonable efforts to deliver such assets to a responsible plan fiduciary (most likely, the plan sponsor) for distribution to plan participants or other appropriate disposition.* If the intermediary is unable to locate a responsible plan fiduciary after a reasonable and diligent search, the intermediary may reallocate such proceeds among its other clients. Under no circumstances may an intermediary retain such assets for its own use.

Field Assistance Bulletin No. 2006-1, *supra*, at 5 (emphasis added).

tributable to policies paid for with plan assets. Prudential was making payments of stock, cash or policy credits to its policyholders when it converted from a mutual life insurance company to a stock life insurance company (a process known as demutualization). The Department explained:

> The proceeds of the demutualization will belong to the plan if they would be deemed to be owned by the plan under ordinary notions of property rights. . . . In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, *or where the policy is paid for out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets.*

Advisory Opinion No. 2001-02A, 2001 WL 429857 (Feb. 15, 2001) at 2, n.2 (emphasis added).

Thus, any earnings restored to the plan that are attributable to investment directions provided by LaRue will be plan assets.

4. As a plan asset, the recovery will be allocated to LaRue.

After the losses have been restored to the plan, the plan fiduciaries are then responsible for allocating those recoveries. A prudent fiduciary would likely allocate any recovered amounts, less expenses, to LaRue. As the Department has noted:

> in this regard, a plan fiduciary must be prudent in the selection of a method of allocating settlement proceeds among plan participants. Prudence in such instances, at a minimum, would require a process by which the fiduciary chooses a methodology where the proceeds of the settlement would be allocated, where possible, to the affected participants in

> relation to the impact the market timing and late trading activities may have had on the particular account.

Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006) at 4. Thus, LaRue is likely to receive the entire recovered amount, less any expenses. For example, LaRue is likely to be charged a distribution fee when the recovered amount is disbursed to him. However, other allocation methods may also be permissible. *See, e.g., id.* ("However, prudence would also require a process by which the fiduciary weighs the costs to the plan or the participant accounts and ultimate benefit to the plan or participants associated with achieving that goal."). Even though no prudent fiduciary could reasonably deny LaRue any recovery, it is significant that LaRue will not receive a guaranteed sum. Such fact confirms that a defined contribution plan's system of disbursement is not simply a "straw transaction," as Respondents contend, Supp. Br. of Resp't in Reply to Br. for U.S. as *Amicus Curiae* 4, but is essential to the functioning of a defined contribution plan.

5. The loss to LaRue's individual account constituted a loss to the plan.

Given the structure of the defined contribution plan – the way in which assets are held, used and allocated, it becomes evident that losses to an individual account may well constitute losses to the plan as a whole. Because the plan's assets are comprised only of the assets of each individual account plan, pecuniary loss to one individual plan component may well cause the plan to have fewer assets. In this way, loss to one account will cause tangible harm to the plan at large. *See* Dana Muir, *ERISA and Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004) ("In [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants'

accounts."). Indeed, the present case is exactly such a situation: LaRue alleges that the plan holds approximately $150,000 less than it would have otherwise held because of fiduciary breaches visited upon his plan account. Br. in Opp'n., App 2a-4a (Complaint). The statutory language of section 502(a)(2) is satisfied when such a loss occurs.

Furthermore, the monies LaRue seeks to recoup are nothing less that the res of the trust itself. By recognizing the mechanics of how a defined contribution plan operates, it is clear that the Fourth Circuit erred in holding that LaRue seeks a recovery that would "solely benefit" himself. Pet. for Writ of Cert., App. A, 6a (citations omitted). LaRue's success will cause the plan to hold greater assets. Thus, his lawsuit is no different than a lawsuit in which all the participants join together to sue for losses to all of their accounts. "Although the number of affected participants differs, the nature of relief - the payment of money to *the plan* – is the same whether the recovery is allocated to the account of one participant, a number of participants, or every participant in the plan." Br. of U.S. as *Amicus Curiae* 9 (emphasis in original).

C. Section 404(c) Of ERISA Confirms That Congress Intended A Loss To An Individual Account To Be Remediable Under Section 502(a)(2).

An analysis of another provision of ERISA – section 404(c) – reveals that Congress anticipated that fiduciaries would be held liable for losses that occur within the confines of only one individual account. Simply put, Congress would not have drafted section 404(c) – a provision that affords protection to fiduciaries from losses that result from a participant's investment decisions – as it did if it did not believe that fiduciaries could be held liable for losses suffered by an individual participant's account. This Court has recognized that it will not interpret statutory language in a way that

renders other language within the statute superfluous. *Hibbs v. Winn*, 542 U.S. 88, 99-101 (2004) (stating that courts are to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 141-42 (1985).

ERISA section 404(a) generally requires fiduciaries to act for the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable plan expenses. 29 U.S.C. § 1104(a)(1)(A). Fiduciaries are held to the standard of a hypothetical prudent person who is knowledgeable about such matters. 29 U.S.C. § 1104(a)(1)(B). Furthermore, fiduciaries are generally required to diversify the plan's investments to minimize the risk of large losses and follow the terms of the plan document as long as they do not conflict with ERISA. 29 U.S.C. § 1104(a)(1)(C) and (D).

However, when a participant directs the investment of his or her own account, ERISA section 404(c) protects fiduciaries from liability for losses that may result. That is, if a participant directs the investment of his or her account and the value of the account is diminished as a result of the participant's investment decision, the fiduciary will not necessarily be liable for the loss. ERISA section 404(c) states:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
>
> . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c). The regulations articulate a number of conditions that must be satisfied if the fiduciary hopes to be immunized from liability. 29 C.F.R. § 2550.404c-1(a)(2).

A review of these regulations makes clear that a fiduciary may be afforded relief on a transactional basis. 29 C.F.R. § 2550.404c-1. That is, the regulations immunize fiduciaries (who have satisfied the appropriate conditions) for each loss-causing investment transaction that a participant has control over. For example, the regulations include the requirement that participants be given information relative to a particular transaction. In particular, if the investment is subject to the Securities Act of 1933, fiduciaries must, immediately before or after the participant makes the investment, provide the participant with a copy of the most recent prospectus provided to the plan. If a fiduciary fails to provide this information, section 404(c) will not protect the fiduciary from liability for loss caused by the investment decision. But if a fiduciary could not be held liable for losses to the plan that resulted from only one investment transaction, then relief under section 404(c) would be unnecessary. This Court should reject an interpretation of section 502(a)(2) that renders section 404(c) superfluous.

D. *Russell* Recognizes The Type Of Recovery Sought By LaRue.

LaRue is seeking the type of recovery that *Massachusetts Mutual. Life Insurance Co. v. Russell* indicates is available under section 502(a)(2). Br. for U.S. as *Amicus Curiae* 6. In *Russell*, this Court rejected a participant's attempt to use section 502(a)(2) to recover compensatory and punitive damages flowing from her employer welfare plans' delay in providing her the benefits to which she was entitled. Specifically, the participant alleged that "[t]he interruption of benefit payments allegedly forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated

the psychological condition that caused [the participant's] back ailment." *Russell*, 473 U.S. at 137. The participant did not allege that she was denied her full plan benefits, but rather sought recovery for the emotional distress caused by the temporary cessation of those benefits. Thus, the participant sought to recover the unique damages that she had suffered, without regard to any loss that the plan may have experienced. *Id.* at 136. In rejecting her claim for relief under section 502(a)(2), the Court reasoned that the participant was seeking individualized relief, rather than relief for the benefit of the plan as a whole. The Court emphasized that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Id.* at 140-41 n.8. The Court noted that recovery for the plan of losses arising from mismanagement of plan assets "inures to the benefit of the plan as a whole." *Id.* at 140. Thus, a fair reading of *Russell* confirms that nonfeasance or malfeasance affecting plan assets is the touchstone of the statutory requirement of "losses to the plan." 29 U.S.C. §§ 1109, 1132(a)(2).

The Fourth Circuit's summary characterization of the relief sought in this case as individual in nature represents a failure to undertake the proper analysis called for by *Russell*. Unlike the participant in *Russell*, LaRue alleges that the fiduciaries have diminished the total assets of the DeWolff Plan. The fact that the diminution in value of the total assets of the DeWolff Plan happened to take place within the boundaries of LaRue's single account is irrelevant. Nor is it relevant that, if LaRue prevails, it is likely that the plan will allocate the recovery – less plan expenses – to only LaRue's account, rather than the accounts of other individuals. Nothing in *Russell* requires a section 502(a)(2) claim to seek relief that benefits all, or a certain percentage, of plan participants. Rather, a 502(a)(2) claim must benefit the plan as a whole, as LaRue's claim certainly does. See *supra* Part I.B.

II. LaRue's Withdrawal Of Funds From His Account Does Not Warrant Dismissal Of The Writ.

Respondents argue in their motion to dismiss the writ that this case is moot because LaRue withdrew his funds from his account and may therefore no longer bring a claim under either section 502(a)(2) or section 502(a)(3) of ERISA. Respondents' argument relies on a flatly incorrect definition of the term "participant" and also on a misunderstanding of the way in which defined contribution plans function. Not only is LaRue a "participant" within the meaning of both sections 502(a)(2) and (a)(3) of ERISA, it is clear that, if LaRue prevails on one or both of those legal theories of recovery, the money awarded will be returned to the DeWolff Plan and then disbursed to LaRue. An active dispute, capable of being remedied, remains between the parties.

A. Respondents Confuse Mootness With A Challenge To LaRue's Right To Recover Under Section 502(a).

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Where claims in the case remain unresolved and are "hotly contested by clearly adverse parties," a case is not moot. *Id.* at 498 ("Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties.") Moreover, the doctrine of mootness does not permit a litigant to present to the Court every merits-based defense in an attempt to show that the requested claims for relief will fail. That is, mootness should not be "confuse[d with a challenge to the plaintiff's] right to recover. *Id.* at 500. In *Powell*, this Court explicitly rejected an attempt by the respondents to argue

that, since the plaintiff (petitioner) brought suit in the incorrect forum, the case should be dismissed as moot:

> Finally, respondents seem to argue that Powell's proper action to recover salary is a suit in the Court of Claims, so that, having brought the wrong action, a dismissal for mootness is appropriate. The short answer to this argument is that it confuses mootness with whether Powell has established a right to recover against the Sergeant at Arms, a question which it is inappropriate to treat at this stage of the litigation.

Id.

Just as the Court rejected the mootness challenge in *Powell*, it should reject Respondents' mootness challenge in this case. Respondents' assertion that LaRue is no longer a "participant" within the meaning of ERISA is merely an argument that LaRue has no right to recover against Respondents. In the lower courts, Respondents successfully obtained a judgment on the pleadings on the grounds that, even if all of the allegations within LaRue's complaint were taken as true, LaRue could not state a claim under sections 502(a)(2) or (a)(3) because he failed to allege a "loss to the plan" and he was not truly seeking "appropriate equitable relief." By bringing the "new" fact of LaRue's withdrawal of funds to this Court's attention, Respondents have simply taken an argument about why they believe ERISA affords LaRue no relief and labeled it a mootness challenge. This contention is no different than if Respondents had recently discovered that LaRue's investment instructions had in fact been followed, such that there was no "breach[of] any of the responsibilities, obligations, or duties imposed upon fiduciaries" within the meaning of section 409 of ERISA. To give Respondents' contention that LaRue is not a "participant" within the meaning of section 502(a) more than passing attention would impermissibly enlarge the doctrine of moot-

ness so that it requires the Court to adjudicate all merits-based defenses before satisfying itself that a case is not moot.

Respondents' contention – that LaRue's withdrawal from the plan constitutes an intervening event that proves that LaRue is no longer a participant and hence no longer entitled to maintain an action under section 502(a)(2) or (a)(3) – contrasts sharply with the kind of argument that would deserve this Court's attention. Suppose that LaRue's counsel had written a letter to Respondents' counsel last week, conceding that LaRue was no longer entitled to maintain an action under section 502(a)(2) or (a)(3) but refusing to voluntarily dismiss the case. Respondents could bring such an intervening event to this Court's attention and request dismissal of the writ as moot. But as long as this Court satisfies itself that the parties are contesting the issue of whether LaRue can maintain an action under section 502(a) – which they certainly are – this Court need not concern itself with the various arguments that constitute that dispute. Instead, it can and should focus its attention on the important legal issues that are squarely presented in this case.

B. Once The Mootness Label Is Removed, Respondents' Argument Is Revealed To Be A Procedurally Improper One.

Respondents likely characterized their argument as a mootness challenge because a cursory review of the procedural posture of this case makes abundantly clear that their argument cannot be considered at this time. This case was dismissed on a motion for judgment on the pleadings, so this Court must take as true LaRue's allegation that he is a participant. If Respondents wish to challenge LaRue's status, they must do so on remand in a motion for summary judgment.

The district court dismissed LaRue's complaint pursuant to a Rule 12(c) motion for judgment on the pleadings. Pet. for Cert., App. 15a-16a. It is beyond dispute that, in adjudicating a motion for judgment on the pleadings, all facts alleged in the pleadings must be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The complaint properly alleged that LaRue was a participant. Br. in Opp'n., App. 2a. The complaint nowhere alleged any facts concerning LaRue's withdrawal of any funds from his account. Indeed, it could not have done so, as LaRue withdrew his funds in July of 2006, two years after his complaint had been filed (on June 2, 2004) and well after the district court had entered judgment dismissing the case. For the same reason, and even more importantly, the Respondents did not challenge in their motion for judgment on the pleadings that LaRue was a participant. As such, this Court is required to take as true the fact that LaRue is a participant in the DeWolff plan.

Respondents' attempt to invoke recently discovered facts in support of dismissal is no different than if they recently unearthed evidence that the fiduciaries followed LaRue's investment instructions. Respondents would not be permitted to raise such an argument before this Court simply by asserting that a new legal issue has presented itself. *See* Mot. to Dismiss 2,7. Instead, Respondents would be required to present such evidence on remand in a Rule 56 motion for summary judgment, because they would be seeking to introduce materials outside of the pleadings.

Once this Court has resolved the preliminary legal question of whether LaRue is seeking the type of recovery that is remediable under either section 502(a)(2) or (a)(3), the Respondents will be free on remand to challenge LaRue's status as a participant within the meaning of ERISA. They will undoubtedly present other, similar challenges to the allegations in LaRue's complaint, such as whether their failure

to follow his investment instructions constituted a breach of fiduciary duty, or whether their alleged breach of duty caused the diminution in value of assets of $150,000. It should not concern this Court that Respondents will make such arguments; nor should it concern this Court that Respondents might successfully obtain judgment as a matter of law. An eventual defeat for LaRue does not undermine the propriety and importance of the resolution of the questions that are squarely presented by this case.

C. This Court Need Not Treat The Issue Of Whether LaRue Is A "Participant" As A Threshold Question.

In addition to arguing that the case should be dismissed as moot, Respondents urge this Court to dismiss the writ as improvidently granted because a new legal issue has presented itself that is "logically antecedent to the issues on which this Court granted certiorari." Mot. to Dismiss 7. As explained in *supra* Part II.B., the procedural posture of this case bars such an argument by Respondents. But Respondent are also mistaken in their belief that the issue of whether LaRue is a participant necessarily precedes the questions presented in this case. Neither question presented requires this Court to first determine whether LaRue is a participant. The section 502(a)(2) question turns on whether a diminution in value of the total assets of a defined contribution plan that results from the breach of fiduciary duty towards only one particular participant is nevertheless a loss to the plan as a whole. This question does not require the Court to determine whether a person who has withdrawn his or her funds from the defined contribution plan is a participant. Nor is that issue relevant to the section 502(a)(3) question, which turns on this Court's interpretation of the term "appropriate equitable relief." Moreover, although Respondents cite a few cases that suggest that LaRue lacks standing to assert his claims, there can be no

doubt that LaRue satisfies all of the requirements of constitutional standing. Despite some references by Respondents to "statutory standing," whether LaRue is a "participant" is simply a defense on the merits of his section 502(a) claims. *Harzewski v. Guidant Corp.*, No. 06-3752, 2007 WL 1598097 at 3 (7th Cir. June 5, 2007) ("Except in extreme cases . . . the question whether an ERISA plaintiff is a 'participant' entitled to recover benefits under the Act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than as a question of the plaintiff's right to bring the suit."). As such, this Court need not treat the issue of whether LaRue is a participant as a threshold inquiry.

D. LaRue Is A "Participant" Because He Has A Colorable Claim That He Will Prevail In A Suit For Benefits.

Should this Court disagree with the reasons articulated above for ignoring Respondents' argument that LaRue is not a participant, it can easily conclude LaRue is currently a participant within the meaning of section 502. Respondents label LaRue a "former plan participant," Mot. to Dismiss 3, but no such term exists in ERISA. To the contrary, it is clear that the term "participant" may include even individuals who no longer hold accounts in defined contribution plans. The term "participant" includes "former employees who . . . have a colorable claim to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). Thus, participants who received distributions of their account balances from a defined contribution plan may still be participants if they have a colorable claim to additional benefits under the plan. ERISA defines the term "participant" as:

> *any* employee or *former employee* of an employer, or any member or former member of an employee organization, *who* is or *may become eligible to re-*

> *ceive a benefit of any type from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis added). As this Court held in *Firestone*, participants include former employees who are reasonably expected to have benefits under an employee benefit plan:

> In our view, *the term "participant" is naturally read to mean* either "employees in, or reasonably expected to be in, currently covered employment,". . . or *former employees* who "have . . . a reasonable expectation of returning to covered employment" or *who have "a colorable claim" to vested benefits*. . . . In order to establish that he or she "may become eligible" for benefits, *a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits*, or that (2) eligibility requirements will be fulfilled in the future.

489 U.S. at 117-18 (citations omitted; emphasis added). In *Firestone*, former employees of Firestone sought damages for Firestone's failure to provide them with information regarding their benefits under three different employee benefit plans. *Id.* at 106. The former employees had requested the information from Firestone (which was the administrator and fiduciary) pursuant to ERISA's disclosure provisions, but they had made their requests after Firestone had already sold its Plastics Division to Occidental Petroleum Company. *Id.* at 105-106. As a result, Firestone took the position that the former employees were not "participants" in the plans when they made their requests and thus were not entitled to receive the information they had requested. *Id.* at 106. The district court granted summary judgment in favor of Firestone because, *inter alia*, it agreed with Firestone's position that the former employees were not "par-

ticipants" (or "beneficiaries") when they requested the information from Firestone. The Court of Appeals reversed and this Court affirmed. After articulating its interpretation of the definition of the term "participant," the Court remanded the case for further proceedings to determine whether the former employees were in fact "'participants' with respect to the benefit plans about which they sought information." *Id.* at 118.

Just as the former employees in Firestone had a colorable claim to "benefits," (the benefits in that case being the disclosure of information) LaRue is a former employee who has a colorable claim that he will prevail in litigation to obtain benefits – the money that would have been earned had LaRue's investment instructions been followed. In a defined contribution plan, "an employee's retirement benefit is the eventual value of his or her account to which contributions have been made by the employer and / or the employee." *West v. AK Steel Corp.*, 484 F.3d 395, 398-99 (6th Cir. 2007); 29 U.S.C. § 1002(34). "[T]he benefits themselves are not specified; they are just whatever is in the account when it is cashed out, provided the formula is properly applied." *Harzewski*, 2007 WL 1598097 at 4. If those benefits are miscalculated and then disbursed to the employee, there is no doubt that the employee can sue to recover the correct amount. *Id.* at 3. Similarly, if the fiduciary "had stolen half the money in a plan participant's retirement account and a suit by the participant resulted in a judgment for that account; the suit would have established the retiree's eligibility for a larger benefit." *Id.* The result is exactly the same if some other breach of duty by the fiduciary causes a decrease in the value of the account. "The benefit in a defined-contribution pension plan is, to repeat, just whatever is in the retirement account when the employee retires or *whatever would have been there had the plan honored the employee's entitlement, which includes an entitlement to pru-*

dent management." *Id.* at 4 (emphasis in original). Although he received a partial distribution of his benefits, LaRue alleges that his benefits would have been greater had the fiduciaries honored their obligation to follow his investment directions. *See* 29 U.S.C. § 1104(a)(1) (requiring plan fiduciaries to abide by the defined contribution plan document); Br. in Opp'n, App. 19a (Summary Plan Description of the DeWolff Plan, attached to Complaint) ("You will be able to direct the investment of your entire interest in the Plan."). Thus, his "benefits" are not simply what existed in his account when he withdrew his funds, but rather what would have been in his account had the fiduciaries not breached their duties.[13] As a result, upon the restoration of losses to the Plan and subsequent allocation of some or all of these losses to his account, LaRue will have additional benefits under the plan. This would be true regardless of whether his account balance were $119,009.13 or zero. *Harzeweski*, 2007 WL 1598097 at 3-4 (holding that former employees who have cashed out of defined contribution plan are "participants"). Because LaRue has a colorable claim that he is entitled to additional benefits, he is a "participant" within the meaning of section 502.

E. Both The Plan And LaRue Will Benefit If LaRue Prevails In His Lawsuit.

In addition to inaccurately characterizing LaRue as a "former plan participant" rather than a "participant," Respondents also assert that LaRue "has no personal stake in whether or not the Plan receives a benefit" because "any

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[13] In addition to breaching their duty to follow the plan document, the fiduciaries breached their duty of act for the exclusive purpose of participants and beneficiaries and did not satisfy the prudent person standard in ERISA section 404(a) when they failed to follow LaRue's investment instructions. 29 U.S.C. 1104(a)(1).

recovery achieved by the Plan would not benefit the Petitioner, because it could only go to the Plan." Mot. to Dismiss 4. Respondents assert that the only way in which LaRue can benefit is if payment of damages is made directly to him. Respondents are wrong. Even though LaRue seeks recovery for the Plan under 502(a)(2) and (a)(3), he will ultimately receive some or all of the monies awarded as a result of his lawsuit. As explained in *supra* Part I.B.3, if LaRue prevails in this lawsuit, the losses will first be restored to the Plan. However, once the lost earnings are paid to the plan, the fiduciaries have the responsibility to prudently allocate these amounts. *See supra* Part I.B.4. Thus, if LaRue prevails in his suit, the recovery will be paid to the DeWolff Plan and subsequently allocated in whole or in part to an account established for LaRue in the Plan.

That LaRue has withdrawn funds from his account in the DeWolff Plan has no bearing on such an allocation. Even if a plan is terminated, fiduciaries are required to distribute proceeds to plan participants. As the Department has explained:

> An intermediary may also receive proceeds *on behalf of plans that have terminated.* In such instances, an intermediary should make reasonable efforts to *deliver such assets to a responsible plan fiduciary (most likely, the plan sponsor) for distribution to plan participants* or other appropriate disposition. If the intermediary is unable to locate a responsible plan fiduciary after a reasonable and diligent search, the intermediary may reallocate such proceeds among its other clients. Under no circumstances may an intermediary retain such assets for its own use.

Field Assistance Bulletin No. 2006-01, 2006 WL 1223369 (April 19, 2006) at 5. If fiduciaries must distribute settlement proceeds in even the situation of a terminated plan,

there can be no doubt that fiduciaries are required to distribute litigation funds to a person who has withdrawn the undisputed portion of his funds from the plan. Accordingly, LaRue continues to have a personal stake in this lawsuit.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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